Petition

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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID MILLER,

Petitioner,

vs.

WILLIAM H. WEBSTER, WILLIAM FRENCH SMITH, FEDERAL BUREAU OF INVESTIGATION and UNITED STATES DEPARTMENT OF JUSTICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI

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	)
vs.	)
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THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the agency affidavits were sufficient -- in light of other contradictory evidence -- to sustain the agency's burden of claiming exemption (b)(7)(D)?

2. Whether there exists a substantial public interest sufficient to overcome a (b)(7)(C) privacy claim when the requestor:

a. by means of complete disclosure, seeks to determine if the agency's investigation of the alleged wiretap was complete and adequate; and

b. seeks the names of agents to determine if he has a cause of action under 18 U. S.C. §2520.

II. LIST OF ALL PARTIES

All parties appear in the caption of the case in Court.

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V. OPINIONS BELOW

a. Opinion of the District Court: Miller v. Webster, et al., 483 F.Supp. 803 (N.D. Ill. 1979)(Hon. Prentice Marshall, J.)

b. Opinion of the Appellate Court. Miller v. Webster, et al., ____F.2d____(No. 79-1210, 7th Cir. decided 10/1/81)

VI. STATEMENT OF JURISDICTIONAL GROUNDS

(i) Judgment was rendered by opinion and entered on October 1, 1981.

(ii) No rehearing was sought.

(iii) No cross-petition for writ of certiorari has been filed.

(iv) The jurisdiction of the Court is invoked by the authority of 28 U.S.C. 1254(1).

VII. STATUTE INVOLVED

The Freedom of Information Act, 5 U.S.C., provides in pertinent part:

(a) Each agency shall make available to the public information as follows:

* * * * *

(b) This section does not apply to matters that are --

* * * * *

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

STATEMENT OF THE CASE

Plaintiff requester is a college physics professor and a former employee of the Argonne National Laboratory. At the height of the Watergate events in 1973, he discovered evidence of an apparent wiretap on his telephone lines at his home in Downers Grove, Illinois, He immediately contacted the FBI which responded quickly. An investigation was conducted with Dr. Miller being in close consultation with the FBI. All of a sudden, contact with the FBI ceased and Miller was unable to ascertain even the result of the investigation. Accordingly, in 1975 -- and after writing numerous letters to the FBI and the local United States Attorney asking if a prosecution had been started -- he filed, pursuant to the Freedom of Information Act, 5 U.S.C. 552 ("the FOIA') a request of the United States Attorney for the Northern District of Illinois and the Justice Department for all records concerning his wiretap complaint to the FBI. His request was referred to FBI

Headquarters.*/

On October 22, 1976, the FBI released 49 pages of material to plaintiff explaining that excisions had been made from the released documents and that other documents were being withheld in their entirety pursuant to Exemptions 2, 7(C) and 7(D) of the FOIA Act, 5 U.S.C. 552(b). Subsequently, on plaintiff's administrative appeal, the FBI determined to release two more pages and to reduce the number of deletions on certain pages previously released.

On September 7, 1977, plaintiff filed his complaint in the district court seeking to compel disclosure of all non-released items. (Jurisdic-

*/ Throughout this litigation, the parties have interpreted Miller's initial request in radically different fashions. Miller maintains that the pro se request was the typical request for all documents from all FBI and U.S. Attorney records systems identifiable wiretap incident. The defendants have construed it to be confined to the wiretap incident. The request was made befor the FBI issued Privacy Act notices describing its records systems. And it turned out that the defendants had other documents on Miller as well.

tion was based on 5 U.S.C. 552(a)(4)(B). Plaintiff also filed a "Motion Under Vaughn v. Rosen To Require Detailed Justification, Itemization and Indexing", which the court granted. In response, the government filed the affidavit of James Edward King, a Special Agent of the FBI.

In his 18 page affidavit, Agent King reported that the FBI had one investigative file concerning the alleged wiretapping incident mentioned in plaintiff's request. He explained that the FBI had investigated plaintiff's complaint that someone had wiretapped his telephone, discussed the matter with the United States Attorney's Office, and closed the case when the U.S. Attorney declined prosecution.1/

1/ The FBI reported the results of its investigation to the United States Attorney by letter dated November 29, 1973. It reported the following facts:

On September 8, 1973, David Miller, 5522 South Main Street, Downers Grove, Illinois, made a complaint concerning a possible intrusion on his telephone. Investigation was conducted and it was determined that an Illinois Bell Telephone (IBT)repairman was at the site on August 24, 1973. This individual advised that while working on the line he hooked into the line to report a problem he was having with his vehicle. After making his call he returned the transmitting wires under the protective coverings. The wire was forwarded to the Federal Bureau of Investigation Laboratory which could not determine whether or not any additional marks were in the wire to those des-

Agent King further explained that the investigative file:

> consists of 12 documents for a total of fifty-one (51) pages. Four of these documents (a total of 19 pages) contain the results of investigative efforts by the Bureau. The remaining eight documents (a total of 32 pages) represent correspondence relating to Mr. Miller's inquiries in 1974 to the FBI, members of Congress and Department of Justice concerning the incident. Plaintiff received all twelve documents, totalling 51 pages with deletions based upon exemptions of the FBI...

Id.

Agent King itemized each document contained in the investigative file and stated the exemptions claimed for all of the withheld information. King also attached to his affidavit copies of the excised documents which were numbered to correspond to the

(cont'd) cribed as having been made by the repairman.

In view of this no further investigation is contemplated by this office.

detailed itemization.

Agent King indicated in his affidavit that the withheld documents may be broken down into two categories -- reports of interviews and names of FBI agents. As to the interviewees, their names were withheld under exemptions 7(C) and (D) on the ground they were received in confidence; that the FBI could not carry out its investigations if confidential interviews were released; and that release would both constitute an unwarranted invasion of the privacy of those interviewed and break the confidentiality under which it was received. King stated that the FBI's ability to interview individuals "is dependent upon the public's belief in the integrity of the FBI and was develped through the understanding of mutual trust inherent in the confidential relationship, which was the basis of the source providing us with the information." He added that "[t]o reveal the identity of the source at this time would sever the bonds of mutual trust and destroy the integrity of the

FBI, thus seriously impeding further cooperation between American citizens and this Bureau in attempting to carry out the investigative responsibilities imposed upon us by law." King also said:

> Persons interviewed often assume, quite logically, that the information they furnish is for the assistance of the FBI only in the fulfillment of its responsibilities, and that their identities and their cooperation with the FBI will not be publically exposed. Witnesses to a crime who may expect to be called at a later time to testify in public at a judicial proceeding should be secure in the knowledge that, absent the necessity of such public testimony with its attendant judicial restraints and protections, their assistance rendered the Government will be held in confidence and this confidence will not be violated. The fear of such exposure often inhibits the cooperation of otherwise conscientious citizens.

However, no specifics were related about the promises actually made or procedures followed in the Miller investigation.

The names of FBI agents who were not known to have participated in the investigation and to whom reports were routed were also deleted as per 7(C). The justification was as follows:

> The privacy consideration is to protect these FBI employees, as individuals, from unnecessary questioning and intrusion into their private lives by members of the public. Additionally, FBI agents are charged with the responsibility of investigating all matters within the jurisdiction of the FBI. As such, an Agent may investigate applicant matters for a period of time, followed by assignment to strictly criminal or national security matters. These later assignments may even involve serving in an undercover capacity. To release to plaintiff the identities of all FBI agents involved in the investigation, regardless of their place of assignment or degree of involvement must be considered a release to the public at large. Such wholesale release, without giving consideration to the current investigative assignments of the FBI agents involved, would unnecessarily disclose their identities, serve no useful function to plaintiff, and could possibly jeopardize the current, and unknown to affiant, investigative activity of these Agents. It is noted that FBI agents come into contact with individuals from all strata of society. They conduct searches and make arrests, both of which constitute reasonable, but nonetheless serious, instrusions on peoples' lives. Many of these people carry grudges which last for years and seek any excuse to harrass the responsible Agent.

Plaintiff filed motions for summary judgment, for sanctions against the government for failing to comply with the Court's further indexing order and for further indexing of un-reviewed FBI records' systems. The government filed a Cross Motion for Summary Judgment. Plaintiff

also filed an affidavit of Mrs. Kenneth Triphan, plaintiff's neighbor, who said that she was interviewed by the FBI about the alleged wiretap incident and "[t]hat during said interview, affiant was given no assurances of confidentiality by said FBI agent; nor was [she] led to believe that the information she was giving was taken on an implied promise of confidentiality."

The district court granted plaintiff's motion for summary judgment and ordered the government to disclose all the withheld materials. The court first rejected the government's argument that exemption 7(C) protects the names of FBI agents absolutely. It did find, however, that in the context of an FOIA request, some privacy rights did exist. It nevertheless found that this interest was outweighed in this case by the "public interest in the investigation and disclosure of possible violations of federal statutes. With complete disclosure, plaintiff would be able to determine whether the FBI's investigation of the alleged wiretap was complete and adequate. The Court further stated:

> [T]he public interest in preventing and discovering illegal wiretaps may be vindicated in some cases only by a private litigant's resort to a civil action under 18 U.S.C. §2520. Just as the vindication of constitutional rights by private litigants in §1983 actions serves the public interest, the vindication of important statutory rights such as those embodied in 18 U.S.C. §2520 also serve the public interest. Thus, if plaintiff needs the names of the FBI agents to maintain a suit under §2520, then the release of the names would benefit a public interest.

The district court also stated that the potential dangers from disclosure were minimal here because plaintiff had not been the target of the FBI's investigation. "Thus", the court concluded, "we are left with an abstract potential for harrassment and annoyance and the possibility that future undercover investigations could be jeopardized as justifications for the deletion of the agent's names. These potential invasions of privacy would exist in every case involving disclosure of agents' names, and the government has not indicated any reason for speculating that the potential is greater in this case."

The court reached the same conclusion with respect to the government's argument that the names of the interviewees could likewise be

exempted under 7(C):

> In balancing the public interest in disclosure, which is identical to the interest in release of the FBI agents' names, against the privacy interests of the individual interviewees, we conclude that release will not constitute an unwarranted invasion of personal privacy. This is not a case in which release of names of individuals is tantamount to a statement about the private or illegal activities of those individuals. See Ferguson v. Kelly, 448 F. Supp. 919 (N.D. Ill. 1977). Nor was this plaintiff who seeks disclosure the subject of a criminal investigation. See Maroscia v. Levi, supra. Moreover, we question whether the individuals whose names were deleted were given any representations of confidentiality which would allow them to have any expectation of privacy or would have induced them to give information to the agent. See Triphan affidavit. This is especially true inasmuch as certain of the persons interviewed by the FBI concerning events that they have witnessed might actually believe that they would be required to testify at a later time.

The Court also rejected the government's argument that exemption 7(D) permits the withholding of the names of those persons interviewed by the FBI. The court held that the government had failed to establish that the interviewees were either expressedly or impliedly assured of confidentiality:

> Defendants do not claim that the FBI made an express promise of confidentiality. They do claim that persons interviewed "often assume" that their identities will not be disclosed. (citation omitted). Thus defendants admit, and we agree, that not all persons interviewed by FBI agents assume that their names will be kept confidential. Defendants have not shown that the interviewees in the circumstances of this case could have reasonably assumed or did assume confidentiality. On the contrary, plaintiff has submitted an affidavit from one such interviewee who stated that the FBI agents made no representations of confidentiality nor did the affiant infer any. Triphan affidavit. Moreover, defendants have not shown that this is a case in which the interviewees might have a reason for desiring confidentiality (citation omitted).

In addition to ruling on the exemption 7 claims, the district court, construing plaintiff's FOIA request as one for any documents relating to a wiretap on plaintiff's telephone, and not simply documents relating to the investigation of the wiretap complaints, ordered the FBI to conduct a further search of its files.

On appeal, the Seventh Circuit reversed almost the entire district court ruling. Addressing itself to the (7)(D) exemption claim, the court found that Agent King's affidavit was "length and detailed" enough to meet the standards announced in Scherer v. Kelly, 584 F.2d 170 (7th Cir. 1978)

cert. denied, 440 U.S. 964 and Maroscia v. Levi, 596 F.2d 1000 (7th Cir. 1977):

> [In those case] [w]e concluded that FBI affidavits which "comprehensively set forth the exemptions upon which [the] agency had relied when it excised portions of its files ... and set forth the reasons underlying their use," were sufficient to sustain FBI claims of exemption (citation omitted).

The court, while noting the existence of the Triphan affidavit, felt:

> ... we cannot draw the inference that this indicates that manifestations implying confidentiality were not made to other interviewees, or indeed to Triphan herself on an objective basis. Indeed, the fact that among all the interviewees, only Triphan has waived the confidentiality of her interview is supportive of rather the precisely contrary view -- that the other interviewees did infer and rely upon assurances of confidentiality. See Nix v. United States, 572 F.2d 1004 (4th Cir. 1978).

In addition, the Court felt there existed a strong potential for harassment and invasion of privacy of the individual interviewees because Miller was a "self-admitted""complainer" and also was "litigous." The source of this information apparently was an FBI account of an interview with Miller. The court also characterized Miller's quest to get to the bottom of the wiretap incident

an "anti-government crusade." The court also believed that while the interviewees were free to come forward to help Miller, "... it is not the role of the FBI to suffer them to do so, regardless of the possibly beneficent ultimate purposes of Miller's suit." After saying that, the court reversed the district court as to exemption (7)(D).

Turning to the (7)(C) claims, the court found that even in the absence of specific claims of the potential of privacy invasion, the FBI agents had "serious and substantial" privacy interests:

> ... and absent a countervailing showing of substantial public interest in disclosure [the privacy of the FBI agents] merit[s] the protection of exemption (7)(C). Furthermore, we question the district court's finding that no special hazard of harassment or annoyance exists in this case in light of Miller's self-proclaimed contentiousness.

The Court found no merit in the contention that the public interest is served if Miller is permitted to obtain the requested information to serve as a monitor or watchdog over the adequach and completeness of an FBI investigation. The court feared that rationale could be applied to every

FBI investigation; and it also found Miller's case to be of insufficient public import to justify such treatment. And finally, after noting that the FOIA was not enacted for the benefit of private litigants, see NLRB v. Sears, Roebuck & Co. 421 U.S. 132, 143, n. 10 (1975), the court found it of little public interest that the information, if released, might enable him to prosecute a claim under 18 U.S.C. 2520. Accordingly, it reversed the district court as to the (7)(C) claims.

The opinion of the court was announced and entered on October 1, 1981. Petitioner moved for and was granted a stay of the mandate.

ARGUMENT

This case is presented for certiorari because it involves important issues of federal law which have not been, but should be, settled by the Court. In addition, the decision of the Seventh Circuit conflicts with decisions of this Court in related areas of the law.

1. (7)(C): Public Interest:

In reversing the District Court, the seventh circuit rejected the argument that the public interest in disclosure prevailed over the privacy interests of the FBI agents and the interviewees. It rejected as well the District Court's view that the public benefited by (1) permitting Miller to be a servant watchdog and (2) facilitating investigations of possible civil rights violations.

It is well known that the 1974 amendments -- which significantly "liberalized" disclosure -- came in the wake of Watergate. The legislative history is replete with high sounding phrases extolling the refurbished Act as providing a mechanism for private and journalistic "watchdogs" to monitor government actions. See Sourcebook:

Freedom of Information Act and Amendments of 1974 (P.L. 93-502); Legislative History, Texts and Other Documents, pp. 440 (Remarks of Senator Kennedy). That the FOIA has been used as a watchdog mechanism by private citizens, journalists, interest groups and industry cannot be disputed. See, e.g. Stern v. Richardson, 367 F.Supp. 1366 (D.D.C. 1973)(news story); Weinstein v. Levi, Civ. No. 2278-72 (D.D.C. filed Nov. 16, 1972)(historian seeking Rosenberg investigatory files); Lesar v. Dept. of Justice, 636 F.2d 472(D.C.Cir1980)(Martin Luther King, Jr. FBI investigation).

Arrayed against this approved use of the Act are the cases which state the Act is not for the benefit of private litigants. See, e.g. NLRB v. Sears Roebuc and Co., 421 U.S. 132, 143 n.10 (1975). But, of course, these cases involved information requests concerning matters arguably of much less public interest that the protection of privacy rights from electronic surveillance.*/

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*/ Sears involved disclosure of an NLRB General Counsel's Advice and Appeal memorandum under (b)(5).

If both these uses have been approved, what about using the Act to monitor a law enforcement investigation in which the requester was the person whose complaint initiated the investigation? Isn't the exercise by a private citizen -- albeit one who once had access to national security information with respect to nuclear physics and thus might have real cause to worry if his telephone communications were intercepted -- of a monitoring role just as legitimate? And shouldn't his quest for names of persons having knowledge of the facts of the case -- rather than filing a lawsuit on nothing more than a hunch -- also be approved? And, of course, it is especially difficult for the alleged victim of electronic surveillance to "know" what happened without access to the persons who either saw the tap being put in place or who actually made the tap.

In a similar case which is likely to be presented to this Court, the D.C. Circuit disapproved parts of a request by an initiator of an investigation on (7)(C) grounds. Bast v. DOJ and Bast v. FBI, Nos. 79-2039 and 80-1-50

(D.C. Cir. decided October 8, 1981). Bast, a private investigator, initiated an investigation alleging misconduct against a United States District Judge. The Justice Department found no grounds for proseuction, and Bast made an FOIA request for all documents generated or collected by the investigation. Much of the material was withheld or deleted on the basis of (7)(C).

The Bast presents the same questions as here. How can a private citizen be satisfied that an investigation (here of a high-ranking federal official) was complete and adequate? Isn't the FOIA request possibility the best way to insure that investigations are conducted fairly and completely?

In its present form*/ the FOIA makes no distinctions based on the nature or character of the requester. It is only when the privacy exemptions are claimed, see Dep't of Air Force v. Rose, 425 U.S. 352 (1976) that the public and

*/ Several bills which would materially alter the Act are presently before Congress.

private interests must be balanced.

To say without reservation that a person whose complaint initiated an investigation by a law enforcement agency covered by the Act charging violations of important civil rights is not entitled to full disclosure of the results thereof -- including the names of the investigators and those interviewed, especially when prosecution has been declined -- is to turn the Act on its head. Certainly it cannot be said that vindication of civil rights deprivations as provided by federal statute is not in the public interest; for if it is, this notion conflicts with a number of other accepted principles, most notably the concept of the private civil rights attorney general. See, e.g., the Civil Rights Attorneys Fees Act, 42 U.S.C. 1988; 18 U.S.C. §2520 (provision for attorneys fees).

In this case -- one in which the requester was the investigation's initiator and was not a target -- the privacy interests are minimal and the public interest important enough to tip the scales in favor of disclosure.

2. (7)(D): Was the Agency Affidavit Sufficient?

The upshot of the Seventh Circuit opinion is that if the FBI says it is so, the it must be so. To hold this is to eviscerate the Act's de novo review requirement. It also adopts reasoning taken from the (b)(1)[national security] cases -- a context in which deferral to agency expertise makes sense because of the special circumstances as long as the agency affidavits are sufficiently descriptive, see Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978) -- and applies it mechanically to the (7)(D) context. It is true that the legislative history is brief and seemingly unambiguous; but a literal application of that intent -- without reference to the specific factual context -- yields absurd results.

Indeed, the line of cases decided by the Seventh Circuit and relied upon in support of non-disclosure without exception re (7)(D) involve requests by investigatory targets. Scherer v. Kelly, 584 F.2d 170 (7th Cir. 1978) cert. denied, 440 U.S. 964 (target of ATF, FBI &

Customs Service investigation); Maroscia v. Levi, 569 F.2d 1000 (7th Cir. 1977)(domestic intelligence investigation target); Terkel v. Kelly, 599 F.2d 214 (7th Cir. 1979)(domestic intelligence target); see also Nix v. United States, 572 F.2d 998 (4th Cir. 1978)(prison inmate).

Here the requester is not a target; he is the initiator. It can be safely assumed that many of the interviewees were his neighbors. Despite these unique circumstances, the agency affidavit, as extensively quoted in the Statement of the Case, recites boilerplate with respect to threats, harassment and blanket indicia of confidentiality. No effort is made to distinquish this case from that of a target requester.

Moreover, the Seventh Circuit, in search of some evidence of the likelihood of harassment specific to the case, draws forth from an obscure corner of the record the completely self-serving and hearsay characterization of the requester as "contentious", "litigbus" and a person on "an anti-government crusade." This "evidence", which is dubbed a "self-admission", becomes the keystone

of the court's decision to reverse as to (7)(D).*/

It is submitted that as the district court held, the agency failed to offer more than a general, conclusory affidavit -- one that was contradicted by the affidavit of one interviewee, a Mrs. Triphan -- and thus failed to carry its burden of proof as to (7)(D). To say otherwise is to completely relieve the government of any burden of proof as to (7)(D) exemption claims, a result, it is submitted, not intended by Congress.

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*/ Even if the court were not confined to a "clearly erroneous" standard of review, this use of the record evidence is astonishing and makes a mockery of the adversarial process -- a process already in jeopardy in FOIA cases. See, e.g., Stein v. Dep't of Justice, F.2d (7th Cir. decided 10/19/81)(Slip Op. at 9).

PRAYER FOR RELIEF

For all these reasons stated herein, petitioner prays this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Appendix

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WILLIAM H. WEBSTER, WILLIAM FRENCH SMITH, FEDERAL BUREAU OF INVESTIGATION and UNITED STATES DEPARTMENT OF JUSTICE,

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-1210

DAVID MILLER,

Plaintiff-Appellee,

v.

WILLIAM H. WEBSTER, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 3331—Prentice H. Marshall, *Judge.*

ARGUED MAY 13, 1981—DECIDED OCTOBER 1, 1981

Before CUMMINGS, *Chief Judge,* PELL, *Circuit Judge,* and LARSON, *Senior District Judge.**

PER CURIAM. This appeal arises under the Freedom of Information Act, 5 U.S.C. § 552. The plaintiff David Miller (Miller) requested the Federal Bureau of Investigation (the FBI or the Bureau) and the Justice Department to provide him with all documents relating to his complaint to the FBI that someone had wiretapped his telephone.[1] The FBI released some 54

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* Earl R. Larson, Senior Judge of the District of Minnesota, is sitting by designation.

[1] The FBI reported the results of its investigation to the United States Attorney by the following letter dated November 29, 1973:

(Footnote continued on following page)

pages of material to the plaintiff, but, pursuant to exemptions 7(C) and (D) of the Act, §§ 552(b)(7)(C) & (D), the Bureau excised the names of persons interviewed in connection with the investigation, third parties named in those interviews, and FBI agents who took part in the investigation. The plaintiff brought suit to compel disclosure of the excised information. The district court granted the plaintiff's motion for summary judgment, and ordered the FBI to disclose all excised material. The issue presented by this appeal is whether the trial court erred when it found that exemptions 7(C) and (D) were not applicable to the excised names.

I.

As a threshold matter, the plaintiff challenges this court's jurisdiction of this appeal, claiming that the district court's order requiring the FBI to turn over the excised information is not a final order, and thus is not appealable.

A disclosure order in a FOIA suit is injunctive in nature. It is granted pursuant to 5 U.S.C. § 552(a)(4)(B), which confers jurisdiction upon the district court, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." This vests the district court with all the powers of an equity court to issue in-

[1] *continued*

On September 8, 1973, David Miller, . . . made a complaint concerning a possible intrusion on his telephone. Investigation was conducted and it was determined that an Illinois Bell Telephone (IBT) repairman was at the site on August 24, 1973. This individual advised that while working on the line he hooked into the line to report a problem he was having with his vehicle. After making his call he returned the transmitting wires under the protective coverings. The wire was forwarded to the Federal Bureau of Investigation Laboratory which would not determine whether or not any additional marks were in the wire to those described as having been made by the repairman.

In view of this no further investigation is contemplated by this office.

junctive relief from withholding of agency records. *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 18, 20 (1974). The courts of appeals have jurisdiction of appeals from interlocutory orders of the district court granting injunctions, pursuant to 28 U.S.C. § 1292(a). Thus we have jurisdiction of the present appeal regardless of whether other issues remain pending in the district court.[2] *Coastal States Gas Corp. v. Department of Energy*, 644 F.2d 969, 979 & n.15 (3d Cir. 1981); *cf. Theriault v. United States*, 503 F.2d 390, 391 (9th Cir. 1974) (when release of documents under FOIA is the ultimate relief sought by party, an order compelling their release is final under doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)).

II.

Before turning to the Bureau's specific assignments of error in the district court decision, a brief overview of the relevant statutory framework may be helpful. The purpose of the FOIA is to allow public access to official information unnecessarily shielded from public view, *see EPA v. Mink*, 410 U.S. 73, 80 (1973). An agency must release information in its possession unless it falls within one of the nine statutory exemptions to the Act. In light of the policy favoring disclosure, however, those exemptions are to be narrowly construed. *Theriault v. United States*, 503 F.2d 390, 392 (9th Cir. 1974). The Act provides that the district court is to make a de novo review of the administrative claim of exemption, and that the burden of justifying the decision to withhold is on the agency. 5 U.S.C. § 552(a)(4)(B).

---

[2] At the time this appeal was taken issues remained before the District Court with respect to disclosure of letters to the FBI from Senators Percy and Stevenson and Congressman Erlenborn, and of attorney's fees. The letters were disclosed in the entirety following in camera review by the district court. The attorney's fees issue has also been disposed of below, and is the subject of a separate appeal to this court.

In light of the circumstances of this suit,[3] it is also well to note that it is not the purpose of the Act to benefit private litigants, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975), by serving as an adjunct or supplement to the discovery provisions of the Federal Rules of Civil Procedure, *Nix v. United States*, 572 F.2d 998, 1003 (4th Cir. 1978).

In 1974, Congress amended the FOIA provisions governing the role of a reviewing court in considering claimed exemptions. Prior to 1974 investigatory files compiled for law enforcement purposes were deemed entirely exempt from disclosure. *See, e.g., Center for National Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 372 (D.C. Cir. 1974). The 1974 amendments narrowed this broad grant of exemption by limiting its application to particular types of information within the investigatory file.

Congress was extremely concerned, however, that personal privacy and confidentiality be preserved by means of exemptions 7(C) & (D), those at issue in this suit. Senator Hart, who introduced the amendment, discussed at length the purpose and operation of these exemptions in a Memorandum Letter contained in the legislative history of the amendments. He stated:

> A question has been raised as to whether my amendment might hinder the [FBI] in the performance of its investigatory duties. The Bureau stresses the need for confidentiality in its investigations. I agree completely. . . .
>
> . . . My amendment would not hinder the Bureau's performance in any way. . . . [The

[3] At oral argument counsel for the plaintiff stated, "The reason Dr. Miller wants to have the names is so he can conduct an investigation to find out if those persons have any knowledge upon which he can enforce his rights under 18 U.S.C. § 2520 [the anti-wiretapping statute]." Similarly the plaintiff's brief contends that he wishes to enlist the support and cooperation of those whose names have been excised in his effort to discover governmental wrongdoing.

> amendment] was carefully drawn to preserve every conceivable reason the Bureau might have for resisting disclosure of material in an investigative file:
>
> > If informants' anonymity—whether paid informers or citizen volunteers—would be threatened, there would be no disclosure;
> >
> > . . . .
> >
> > If disclosure is an unwarranted invasion of privacy, there would be no disclosure. . . .;
> >
> > If in any other way the Bureau's ability to conduct such investigation was threatened, there would be no disclosure.

120 Cong. Rec. S17040 (1974), *reprinted in* Subcomm. on Govt. Information and Individual Rights, House Comm. on Govt. Operations. 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and other Documents (Joint Comm. Print) 351 (hereinafter cited as FOIA Source Book).

In relation to the confidential information and source provisions of exemption 7(D), Senator Hart was specific in identifying precisely the burden of justification for withholding that the exemption imposed upon the Bureau:

> [T]he agency not only can withhold information which would disclose the identity of a confidential source but also can provide blanket protection for any information supplied by a confidential source. The President is therefore mistaken in his statement that the FBI must prove that disclosure would reveal an informer's identity; all the FBI has to do is to state the information was furnished by a confidential source and it is exempt.

120 Cong. Rec. S36871 (Remarks of Sen. Hart) (1974), *reprinted in* FOIA Source Book at 451. *See Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

A. Exemption (b)(7)(D).

We first turn our attention to (b)(7)(D), which exempts investigatory records compiled for law enforcement purposes to the extent that their release would "disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, . . . confidential information furnished only by the confidential source." The district court noted that this exemption is available to an agency either if the source of the information is given an express assurance of confidentiality, or if one could reasonably infer such an assurance from the circumstances of the interview. It concluded that the Government had failed to carry its burden of proof on its claim that the interviews at issue were given with such implied assurances of confidentiality. The trial court expressed two grounds for its conclusion. First, it noted an affidavit from one interviewee which specified that no express assurances of confidentiality were made, and that she did not infer such a pledge of confidentiality. Second, the court held that the Bureau had failed to show that this was a case in which an interviewee might have some reason for desiring confidentiality. The Bureau contends that the trial court erred by imposing a higher standard of proof upon the FBI than that intended by the legislature, and the standard established by this court in *Scherer v. Kelley*, 584 F.2d 170 (7th Cir. 1978), *cert. denied*, 440 U.S. 964.

In *Scherer*, this court examined FBI claims of exemption under §§ 7(C) & (D). We concluded that FBI affidavits which "comprehensively set forth the exemptions upon which [the] agency had relied when it excised portions of its file . . . and set forth the reasons underlying their use," were sufficient to sustain FBI claims of exemption. 584 F.2d at 175, 176. *See Maroscia v. Levi*, 569 F.2d 1000 (7th Cir. 1977). We find that this standard is in keeping with the purpose of the Act as expressed in its legislative history, *supra*.

Special Agent King's lengthy and detailed affidavit of October 28, 1977, adequately meets this standard. It identifies each type of excision and relates them in par-

ticular detail to the relevant claimed exemption. The affidavit also sets forth the reasons of the FBI in relying on the claimed exemptions, and articulately expresses the concern of the Bureau that such material remain confidential in order to preserve the Bureau's ability to elicit continued public cooperation through such interviews. *See Scherer*, 584 F.2d at 176; *Maroscia*, 569 F.2d at 1002. The legislative history makes it clear that the drafters of the 1974 amendments were fully cognizant of such dangers, and did not seek to impose a heavy burden of justification, *see* remarks of Senator Hart, *supra*. We find that the FBI's affidavit demonstrates that the FBI responded to Miller's request in a responsible and conscientious manner. It thus meets the *Scherer* standard, and is sufficient to satisfy the burden of proof imposed upon the Bureau by § 552(a)(4)(B). *Terkel v. Kelly*, 599 F.2d 214, 217 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). Unless there is evidence to the contrary in the record, we believe such promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation. This is necessary not only to protect the individual interviewee, but also to insure the continuing efficacy of FBI criminal investigation. We are unpersuaded by the district court's rationale for its contrary disposition.

The court relied on the affidavit of Mrs. Kenneth Triphan (Triphan), which stated that she did not receive express assurances of confidentiality, nor was she led to believe that the information she gave was taken on an implied promise of confidentiality. The trial court apparently found this subjective evaluation of one interviewee sufficient to infer that the Bureau did not imply confidentiality to any of the interviewees. While we agree that Triphan has waived whatever confidentiality attached to the contents of her own interview, and that the Bureau must therefore disclose its contents to Miller, unless they are otherwise exempt under § 7(C), we cannot draw the inference that this indicates that manifestations implying confidentiality were not made to other interviewees, or indeed to Triphan herself on an objective basis. Indeed, the fact that among all the interviewees, only Triphan has waived the confidentiality of

her interview is supportive of rather the precisely contrary view—that the other interviewees did infer and rely upon assurances of confidentiality. *See Nix v. United States*, 572 F.2d 998, 1004 (4th Cir. 1978).

Nor are we convinced by the district court's assertion that this is not a case in which the interviewees might have a reason for desiring confidentiality. It is true that the interviewees are not here in a situation where revelation of their names is likely to subject them to employer retaliation, *see, e.g., Wellman Industries, Inc. v. NLRB*, 490 F.2d 427, 431 (4th Cir. 1974), *cert. denied*, 419 U.S. 834 (employer sought release of employee interviews), or danger of revenge through physical reprisal, *see, e.g., Nix v. United States*, 572 F.2d 998, 1004 (4th Cir. 1978) (release of names of guards and prisoners who made statements in regard to a prisoner's brutality charge). A strong potential for harassment and invasion of privacy of the individual interviewees does, however, remain a real possibility here.

Miller stated in his original complaint to the FBI that he is "litigatous [sic] and a complainer," and identified himself to the investigating agent as the plaintiff in numerous lawsuits. Miller also recorded the license plate number of the agent's personal automobile at that time, stating that he did so as a matter of course. An internal FBI note released to Miller as part of the material he requested further indicates that he "introduces himself at Township meetings to Sergeant-at-Arms as that officer will most likely bodily remove him from the meeting."

Miller has indicated, *see* note 3 *supra*, that he seeks the deleted names to pursue civil action, and to enlist their cooperation and support. While we applaud the willingness of the interviewees to "get involved," in crime prevention and investigation by speaking to FBI agents confidentially, we can also appreciate that some might be reluctant to enlist, or be drafted, in Miller's anti-government crusade. While they are certainly free to waive their right to confidentiality and step forward, as Triphan has done, it is not the role of the FBI to suffer them to do so, regardless of the possibly beneficent

ultimate purposes of Miller's suit. *See Nix*, 572 F.2d at 1003 (the right of a FOIA plaintiff to obtain information is not enhanced by his needs as a private civil-rights litigant). Furthermore, in light of Miller's self-proclaimed litigiousness, some interviewees might be worried that if Miller disagrees with their statements they might find themselves defendants in expensive civil litigation. As we noted above, we believe it is essential to the continued ability of the FBI to conduct effective criminal investigation that witnesses feel free to fulfill their obligations as citizens without fear of exposing themselves to such intrusion or harassment.

We therefore find that the trial court erred in concluding that exemption 7(D) did not shield the names of the interviewees and third parties mentioned in the interviews from disclosure, with, as we noted above, the exception of the Triphan interview, which alone must be disclosed without excision of the name of the interviewee. We now turn our attention to exemption 7(C) to determine whether the court ruled properly that the other excised names were not protected by its strictures.

B. Exemption (b)(7)(C).

In analyzing the 7(C) exemption, which provides for exemption from disclosure of "investigatory records compiled for law enforcement purposes, . . . to the extent that production of such records would . . . constitute an unwarranted invasion of personal privacy," the trial court adopted the balancing test formulated in *Dept. of Air Force v. Rose*, 425 U.S. 352 (1976). In *Rose*, the Supreme Court held that exemption (b)(6) of the FOIA, "require[s] a balancing of the individual's right to privacy against the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" 425 U.S. at 372.[4] The trial court

[4] The district court properly noted that privacy interests are afforded more protection by (b)(7)(C) than by (b)(6), which requires disclosure unless the invasion of privacy would be "clearly" unwarranted. *See Deering Milliken, Inc. v. Irving*, 548 F.2d 1131, 1136 n.7 (4th Cir. 1977).

recognized that FBI agents have a privacy interest in withholding their names from public disclosure in connection with a criminal investigation. It concluded, however, that since there was no danger to the agents on the facts of this particular case, but rather only an abstract potential for harassment and annoyance and some possibility that future undercover investigations could be jeopardized, such a privacy interest was therefore minimal.

In balancing these potential invasions against the public interest it found in disclosure of the excised names, the trial court concluded:

> [O]nce we have found a public interest in disclosure, and the government has not pointed to any circumstance peculiar to this case which indicates greater potential for harassment, annoyance, or the compromising of undercover assignments than would be present in every case, we shall resolve the balancing test in favor of disclosure. . . . In weighing the public interest in disclosure against the privacy interests, we conclude that the government has not satisfied its burden and that disclosure here will not constitute an "unwarranted" invasion of personal privacy. Defendants must release the names of FBI agents withheld. . . .

Mem. Op. at 9 (citations omitted). The FBI contends that the trial court erred, first by weighing too lightly the asserted privacy interests of the FBI agents, and second, by according too substantial a weight to the purported public interest in disclosure. We will turn our attention to each seriatim, and then to the manner in which the district court balanced them one against the other.

1. Privacy Interests of the FBI Agents

The district court concluded that FBI agents must have a privacy interest peculiar to the facts of a given case before those interests are serious enough to warrant disclosure. We are persuaded that the court erred by seeking such a particular interest, and that the King af-

fidavit sets forth privacy considerations sufficient to establish that FBI agents have not insubstantial privacy interests whenever disclosure is sought of records of a criminal investigation.

In identifying those privacy concerns, King's affidavit stated:

> The privacy consideration is to protect these FBI employees, as individuals, from unnecessary questioning and intrusion into their private lives by members of the public. Additionally, FBI Agents are charged with the responsibility of investigating all matters within the jurisdiction of the FBI. As such, an Agent may investigate applicant matters for a period of time, followed by assignment to strictly criminal or national security matters. These latter assignments may even involve serving in an undercover capacity. To release to plaintiff the identities of all FBI agents involved in the investigation, regardless of their place of assignment or degree of involvement, must be considered a release to the public at large. Such wholesale release, without giving consideration to the current investigative assignments of the FBI Agents involved, would unnecessarily disclose their identities, serve no useful function to plaintiff, and could possibly jeopardize the current, and unknown to affiant, investigative activity of these Agents. It is noted that FBI Agents come into contact with individuals from all strata of society. They conduct searches and make arrests, both of which constitute reasonable, but nonetheless serious, intrusions into peoples' lives. Many of these people carry grudges which last for years and seek any excuse to harass the responsible Agent.

King Affidavit at 8-9. We find that the FBI has thus met its burden of demonstrating the existence of substantial and legitimate privacy concerns in the names of agents conducting a criminal investigation.

As the Court of Appeals for the Fourth Circuit remarked in *Nix*, 572 F.2d at 1006,

> [o]ne who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.

We believe these privacy interests are serious and substantial, and absent a countervailing showing of substantial public interest in disclosure, merit the protection of exemption 7(C). Furthermore, we question the district court's finding that no special hazard of harassment or annoyance exists in this case in light of Miller's self-proclaimed contentiousness, *see supra*. It is not necessary that harassment rise to the level of endangering physical safety before the protections of 7(C) can be invoked. *See Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980); *Nix*, 572 F.2d at 1006 n.8; *Maroscia v. Levi*, 569 F.2d 1000 (7th Cir. 1978).

2. The Public Interest in Disclosure

The trial court identified two types of public interests which it believed disclosure of the names of the participating agents would further: first, "with complete disclosure, plaintiff would be able to determine whether the FBI's investigation of the illegal wiretap was complete and adequate"; and, second, that if the release of the names of FBI agents might aid the plaintiff in bringing a suit under 18 U.S.C. § 2520, note 3 *supra*, then their release would benefit a public interest. The Bureau contends the court erred by overvaluing both of these asserted benefits.

As to the first of the asserted public interests, that Miller would use the information to serve as a watchdog over the adequacy and completeness of an FBI investigation, we are absolutely unpersuaded by the reasoning of the trial court. As a preliminary matter, we note that this justification would apparently apply to every FBI criminal investigation, severely vitiating the privacy and confidentiality provisions of exemptions 7(C)

and (D). We further find the record demonstrates that this is not a case of sufficient public importance to warrant such a probe of the FBI's efficiency. The plaintiff's broad unsupported hints of a government coverup or undercover surveillance fly in the face of the substance of the disclosed documents which reveal this case as one of consequence to only one individual.[5] There is no allegation of wrongdoing by high-ranking government officials or indeed by any FBI personnel to support any public interest in any further probe into the thoroughness of the instant investigation. *Cf. Congressional News Syndicate v. Dept. of Justice*, 438 F. Supp. 538, 544 (D.D.C. 1977) (Watergate-related investigation). In the absence of such a showing of special public interest in testing the thoroughness of an investigation, we find it of little weight. We further note that, as the plaintiff concedes, the substance of the information in the FBI files has been exposed in its entirety, and only the names of the FBI agents deleted. In this respect the Bureau has followed the directive of this court that only that precise information as to which confidentiality is claimed may be withheld. *Terkel v. Kelly*, 599 F.2d at 1217-18. The documents thus reveal the entire course of the investigation and the facts it uncovered. This information should be sufficient to permit the plaintiff to evaluate the thoroughness of the investigation. We find any public interest in pursuing the completeness and adequacy of the investigation beyond this point to be minimal in the extreme.

We believe that the trial court similarly overvalued the public interest to be vindicated by the plaintiff's maintenance of a private lawsuit. The court noted that a mere private interest in maintaining such a suit would not suffice, but concluded that here the private litigant's interest in such a suit would overlap that of the public, and stated, "Just as the vindication of constitutional rights by private litigants in § 1983 actions serves the public interest, the vindication of important statutory rights such as those embodied in 18 U.S.C. § 2520 also serve the public interest." Mem. Op. at 7-8. As we noted

[5] *See* note 1 *supra*.

above, however, the FOIA was not enacted for the benefit of private litigants, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975).

The *Nix* court rejected a similar argument in a case in which the plaintiff, a prisoner, had filed an FOIA suit to discover documents relating to his alleged mistreatment by prison guards. He had also filed a suit, apparently under 42 U.S.C. § 1983, claiming that the alleged mistreatment violated his civil rights. In rejecting the argument that this created a public interest sufficient to override the guards' right to privacy, the court concluded:

> As this court observed in *Deering Milliken* [*v. Irving*,] 548 F.2d [1131 (4th Cir. 1977)] at 1134-35, FOIA's purpose is to inform the public about the action of government agencies. It was not designed to supplement the rules of civil discovery. Thus, the right of Nix to obtain information is neither enhanced nor diminished because of his needs as a litigant, but is to be measured by the right of the public to obtain the same information.

572 F.2d at 1003. We find this analysis persuasive and applicable a fortiori to this case in which no civil suit has yet been filed, and the rights assertedly violated do not rise to a constitutional level, but where the plaintiff has merely stated that he hopes to obtain information that will aid him in bringing suit. Were this the test for determining the existence of a public interest, every FOIA claimant against the FBI could override the exemption of § 7(C) by the simple expedient of claiming that he hoped to uncover violations of constitutional or statutory rights. Such a test is rife with the potential for abuse, and does not comport with the protective legislative intent embodied in the exemptions of section seven of the FOIA.

3. Balancing

In light of our conclusions above that the agents' interest in privacy is substantial and the public interest in disclosure here is slight, we reverse the trial court's con-

clusion that exemption 7(C) is inapplicable. We also find that the court erred by failing to consider the substantial public interest in maintaining the integrity of future FBI undercover investigations served by the preservation of the privacy of agents' names, which we believe further militates in favor of nondisclosure.

4. Privacy Interests and Third Parties

In light of our holding above that the names of interviewees and third parties are protected under exemption 7(D), we need not reach the question whether they are also protected by exemption 7(C). The question remains, however, whether third party names mentioned in the Triphan interview, as to which § 7(D) confidentiality was waived, are disclosable or protected under § 7(C).

As we noted above, a real potential for harassment and intrusion exists in this case. This could erode the privacy of individuals unknowingly named by an interviewee, such as Triphan, who does not himself or herself desire confidentiality. Revelation to the public at large of the names of such third parties might also stigmatize them as connected with an FBI criminal investigation. Release of their names might not only have these individualized deleterious effects, but also has the potential to lessen public confidence in the integrity of FBI criminal investigations. We therefore find that third parties do have a substantial privacy interest in nondisclosure. In light of our determination above that the public interest in disclosure here is minimal, under the *Rose* balancing test we hold that the third parties' privacy interest outweighs any public interest in disclosure, and the names of third parties mentioned in any interview, including the Triphan interview, are protected by exemption 7(C), and need not be disclosed.

III.

Accordingly, the order of the district court is reversed, except as to the affidavit of Mrs. Kenneth Triphan, which must be released to the plaintiff in its entirety without excisions except for the names of FBI agents

and third parties, which are exempt under § 7(C). The appellee shall bear the costs of this appeal.

AFFIRMED IN PART; REVERSED IN PART.

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Opposition

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No. 81-1257

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID MILLER, PETITIONER

v.

WILLIAM H. WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, Exemption 7(D) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(D), exempts from mandatory disclosure portions of FBI interview reports that identify the persons interviewed in the criminal investigation for which the reports were compiled.

2. Whether, in the circumstances of this case, Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), exempts from mandatory disclosure the names of FBI agents whose participation in the investigation in question is not known to the public.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 661 F. 2d 623. The opinion of the district court is reported at 483 F. Supp. 883.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1981. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including January 13, 1982, and the petition was filed on January 4, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On September 8, 1973, petitioner asked the Federal Bureau of Investigation to investigate the possibility of a

wiretap on his telephone (C.A. App. 65).[1] The FBI commenced an investigation, which uncovered no evidence of wrongdoing (*id.* at 95). By letter of February 4, 1974, FBI Director Clarence Kelley informed petitioner of the outcome of the investigation (*id.* at 107).

Petitioner thereafter filed a request with the Department of Justice, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, for records pertaining to the wiretap investigation (C.A. App. 108-109). The FBI released 49 pages of material to petitioner, explaining that excisions had been made from the released documents and that other documents were being withheld in their entirety, in accordance with Exemptions 2, 7(C) and 7(D) of the FOIA, 5 U.S.C. 552(b)(2), 7(C) and 7(D) (C.A. App. 28, 60-61).[2] Petitioner took an administrative appeal, which resulted in the release of several more pages and the reduction of the number of deletions on certain pages already released (*id.* at 28, 62).

2. Petitioner then brought this action in the United States District Court for the Northern District of Illinois seeking disclosure of all items withheld (C.A. App. 7-14). Respondents submitted an affidavit from FBI Agent James King, a supervisor in the Freedom of Information-Privacy

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[1]"C.A. App." refers to the appendix filed in the court of appeals.

[2]Exemptions 7(C) and 7(D) apply to:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * (C) constitute an unwarranted invasion of personal privacy, [or] (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source * * *.

Exemption 2, which concerns "internal personnel rules and practices," is no longer at issue in this case.

Act Branch of the FBI, explaining that the information withheld under Exemptions 7(C) and 7(D) consisted of those portions of interview reports that would identify informants, several instances of personal information concerning third parties, and names of FBI agents whose participation in the investigation was not publicly known (*id.* at 24-41). Agent King stated (*id.* at 34-35) that the material identifying sources of the information was withheld pursuant to Exemptions 7(C) and 7(D) for the following reasons:

> Persons interviewed often assume, quite logically, that the information they furnish is for the assistance of the FBI only in the fulfillment of its responsibilities, and that their identities and their cooperation with the FBI will not be publicly exposed * * *. The fear of such exposure often inhibits the cooperation of otherwise conscientious citizens.

Agent King stated that the names of FBI agents whose participation in the investigation was not known to the public were withheld pursuant to Exemption 7(C), to protect the agents, "as individuals, from unnecessary questioning and intrusion into their private lives by members of the public" (*id.* at 31). Agent King also observed that disclosure of agents' identities could jeopardize undercover investigative activities and could subject the agents to harassment by individuals bearing grudges (*id.* at 32).

The district court granted petitioner's motion for summary judgment and ordered the release of the information withheld by the FBI (C.A. App. 194-213). The court held that Exemption 7(C) did not support the withholding of the names of the FBI agents, because the agents' privacy interest in nondisclosure of their names was outweighed by the "public interest in the investigation and disclosure of possible violations of federal statutes" (*id.* at 201). Similarly, the court held that the interview report deletions were not exempt under Exemption 7(C), because the same public

interest also outweighed whatever privacy interests the interviewees might have had (*id.* at 204). Finally, the district court rejected the argument that the interview report deletions could be withheld under Exemption 7(D), because "[d]efendants have not shown that the interviewees in the circumstances of this case could have reasonably assumed or did assume confidentiality" (*id.* at 206).

3. The court of appeals reversed (Pet. App. 1-16). It held that the agents' names were exempt from disclosure under Exemption 7(C) and that the interview report deletions were exempt under Exemption 7(D) (*id.* at 15-16). The court concluded that the King affidavit established that the privacy interests of the agents are "serious and substantial" and entitled to protection under Exemption 7(C), "absent a countervailing showing of substantial public interest in disclosure" (*id.* at 12). The court rejected the district court's finding of a significant public interest in release of the information, stating that this case is "one of consequence to only one individual" (*id.* at 13). Since the agents' privacy interests were substantial and the public interest in disclosure was slight, the court of appeals determined that the FBI was justified under Exemption 7(C) in refusing to disclose the agents' names (*id.* at 14-15).

The court of appeals also held that, with one exception, the segments of the interview reports that would identify informants were exempt under Exemption 7(D) (Pet. App. 9). The court noted the significance of confidentiality in criminal investigations and held that Agent King's affidavit satisfied the Bureau's burden of establishing an implied promise of confidentiality (*id.* at 6-7). Although one interviewee had submitted an affidavit stating that she had inferred no promise of confidentiality, the court of appeals concluded that this subjective evaluation did not require the inference that no reasonable person would have considered the interview confidential (*id.* at 7). Furthermore, the court

found, in the circumstances of this case, a "strong potential for harassment and invasion of privacy of the individual interviewees," which could impede law enforcement authorities in the discharge of their investigative responsibilities (*id.* at 8-9).

Finally, the court of appeals held (Pet. App. 15) that, while the report of the interviewee who did not consider the interview confidential had to be disclosed, the names of third parties mentioned in that interview were exempt from disclosure under Exemption 7(C). The court observed (*ibid.*) that these third parties ran the risks of harassment by petitioner and stigmatization through association with a criminal investigation. Accordingly, the court held that the privacy interests of the third parties outweighed the minimal public interest in disclosure and that excision of the names was therefore proper.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals.[3] Accordingly, further review is unwarranted.

1. Petitioner contends (Pet. 20-22) that the court of appeals erred in holding that the FBI made an adequate showing that, with one exception, the persons interviewed in the investigation of petitioner's wiretap charges were "confidential sources" within the meaning of Exemption 7(D) of the FOIA. The contention is without merit. Both the legislative history of Exemption 7(D)—which was added to the statute in 1974 by an amendment to existing Exemption 7—and the case law construing that exemption support the court of appeals' holding in this case.

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[3]Petitioner's assertion (Pet. 15) that "the decision of the Seventh Circuit conflicts with decisions of this Court in related areas of the law" is unsupported by any citations to decisions of this Court.

Exemption 7(D) protects the identities of sources who "provide[] information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 13 (1974), *reprinted in Freedom of Information Act and Amendments of 1974 (P.L. No. 93-502); Source Book: "Legislative History, Texts, and Other Documents"* 230 (Jt. Comm. Print 1975) (hereinafter "*FOIA Source Book*"). Senator Hart, the sponsor of the 1974 amendments to the FOIA, explained in the following terms why, because of the inclusion of Exemption 7(D), the FOIA would not impose a heavy burden on the FBI (120 Cong. Rec. 36871 (1974); *FOIA Source Book* 451):

> [T]he agency not only can withhold information which would disclose the identity of a confidential source but also can provide blanket protection for any information supplied by a confidential source. The President is therefore mistaken in his statement that the FBI must prove that disclosure would reveal an informer's identity; all the FBI has to do is to state that the information was furnished by a confidential source and it is exempt.

Senator Hart emphasized (120 Cong. Rec. 17040 (1974); *FOIA Source Book* 351) that he agreed "completely" with the FBI that it needed to maintain "confidentiality in its investigations," and he also gave assurances that under Exemption 7 as amended there would be "no disclosure" if there were any threat posed to "informants' anonymity—whether paid informers or citizen volunteers."

In this case, as the court of appeals observed (Pet. App. 6-8), the FBI established, in a "lengthy and detailed affidavit," that the deletions at issue included the names of citizens who had given the FBI information in a law enforcement investigation and that it is important "that such material remain confidential in order to preserve the

[FBI's] ability to elicit continued public cooperation through such interviews."[4] The court relied on its own precedents in *Maroscia* v. *Levi*, 569 F. 2d 1000, 1002 (7th Cir. 1977), and *Scherer* v. *Kelley*, 584 F. 2d 170 (7th Cir. 1978), cert. denied, 440 U.S. 964 (1979), as authority for the proposition that FBI investigative reports are customarily, and with good reason, confidential. But other courts, as well, have been willing to assume that persons who give information to the FBI in the course of a law enforcement investigation of serious matters expect that such information will be kept in confidence and not simply turned over on request to anyone who asks for it. See, *e.g.*, *Nix* v. *United States*, 572 F. 2d 998 (4th Cir. 1978); *Malizia* v. *Department of Justice*, 519 F. Supp. 338, 350 (S.D.N.Y. 1981); *Dunaway* v. *Webster*, 519 F. Supp. 1059, 1080-1081 (N.D. Cal. 1981); *Lamont* v. *Department of Justice*, 475 F. Supp. 761, 778-779 (S.D.N.Y. 1979). Petitioner has identified no authority to the contrary.[5]

To be sure, the presumption of confidentiality may be rebutted, as it was in the case of Mrs. Triphan, one of the informants, but the fact that Mrs. Triphan was willing to

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[4]By deleting only material in the interview reports that would tend to identify the informant or that was independently exempt under Exemption 7(C), the FBI released more than the FOIA required. As explained above in the quotation from Senator Hart (page 6, *supra*), information supplied solely by a confidential source in a criminal investigation may be withheld in its entirety under Exemption 7(D).

[5]In *Lame* v. *Department of Justice*, 654 F. 2d 917 (3d Cir. 1981), the court remanded for more evidence on the question of confidentiality for purposes of Exemption 7(D), because the government had not supplied affidavit explanations of the exempt status of *all* of the requested documents and because some of the information withheld had apparently been made public in trial testimony by some of the informants. While we believe the *Lame* panel's analysis of Exemption 7(D) is erroneous, *Lame* is nonetheless distinguishable from the present case, in which all of the deletions have been explained and which does not involve any informants who became trial witnesses.

give information without expecting that it would be kept in confidence does not violate the common understanding, based on the FBI's consistent practice over the years, that information supplied in investigations of criminal charges and other serious matters is not subject to general public disclosure.

In any event, the court of appeals' conclusion that, with the exception of Mrs. Triphan, the informants must have received implicit assurances of confidentiality, does not rest solely on a general presumption respecting the confidentiality of FBI law enforcement investigations. As the court observed (Pet. App. 8), in light of petitioner's characterization of himself as a litigious individual, eager to enlist others in his litigation efforts, there exists a "strong potential for harassment and invasion of privacy of the individual interviewees." In such circumstances, informants would reasonably expect that their involvement in the investigation would be kept confidential.

2. Petitioner also contends (Pet. 15-19) that the court of appeals erred in upholding the FBI's Exemption 7(C) claim for the names of FBI agents who conducted the investigation of petitioner's charges.[6] The question is a narrow one, involving a balancing of the personal privacy interests of the agents against the public's interest in the disclosure of their identities. The court of appeals' conclusion that the privacy interests outweighed the interest in disclosure is both reasonable and consistent with decisions of other circuits.

Both the Fourth Circuit, in *Nix* v. *United States, supra*, 572 F. 2d at 1006, and the District of Columbia Circuit, in

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[6]Petitioner's characterization (Pet. 15) of the court of appeals' Exemption 7(C) ruling as applicable to interviewees is erroneous. Having found that the identities of interviewees could be withheld under Exemption 7(D), the court of appeals found it unnecessary to decide whether they were protected under Exemption 7(C) as well (Pet. App. 15).

Lesar v. *Department of Justice*, 636 F. 2d 472, 487 (1980), have recognized that government agents responsible for the conduct of criminal investigations may in some instances be subjected to annoyance and harassment if publicly identified, and that, in such circumstances, they possess a strong personal privacy interest to be weighed against the public interest in disclosure of their identities at the behest of an FOIA requester. Such a privacy interest is plainly present in the circumstances of this case, given petitioner's "self-proclaimed contentiousness" (Pet. App. 12).

Petitioner's argument that the agents' privacy interest is outweighed by the public interest in assuring that the investigation of petitioner's wiretap charges was properly conducted takes no account of the fact, noted by the court of appeals (Pet. App. 13), that "the substance of the information in the FBI files has been exposed in its entirety, and only the names of the FBI agents [and informants] deleted" and that the released information is "sufficient to permit the plaintiff to evaluate the thoroughness of the investigation." See *Bast* v. *Department of Justice*, 665 F. 2d 1251, 1255 (D.C. Cir. 1981). As the court of appeals also observed (Pet. App. 12-13), petitioner's argument for requiring disclosure of agents' names could be made as to any criminal investigation and, if deemed conclusive, would "severely vitiat[e] the privacy and confidentiality provisions of exemptions 7(C) and (D)."

The case for disclosure is made no stronger by petitioner's personal interest in securing information to aid litigation respecting his wiretap allegations, which he plans to commence in his role as "servant watchdog" (Pet. 15). As petitioner acknowledges (Pet. 16), this Court has made it plain that the FOIA was not enacted for the benefit of private litigants. *Baldrige* v. *Shapiro*, No. 80-1436 (Feb. 24, 1982), slip op. 14 n.14; *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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